

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DONALD F. STAIR</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>PEOPLELEASE/XTREME TRANS.</b>	)	
Respondent	)	Docket No. <b>1,046,724</b>
	)	
AND	)	
	)	
<b>INSURANCE COMPANY UNKNOWN</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent, PeopLease, requests review of the February 8, 2010 preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

This is the second appeal to the Board from a preliminary hearing regarding this claim. Claimant alleged he was bitten by a spider on his second right toe which caused an infection and amputation of the toe. After a preliminary hearing, the Administrative Law Judge (ALJ) determined claimant had met his burden of proof to establish that he suffered a compensable injury. This decision was affirmed by the reviewing Board Member.

A second preliminary hearing was filed and claimant requested a diabetic shoe and orthotic inserts. Respondent again denied the compensability of the claim and requested temporary total disability (TTD) benefits be terminated.

The ALJ again determined claimant suffered a compensable accidental injury and granted additional medical treatment with Dr. Yost including all orthotics prescribed by the doctor.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment with PeopLease and whether claimant is entitled to temporary total disability compensation.

Claimant argues the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The parties agreed that the transcript of the September 4, 2009 preliminary hearing be included as part of the evidentiary record at the February 5, 2010 preliminary hearing. The Board Order issued November 20, 2009, accurately detailed the facts regarding this claim in the following manner:

Claimant has been a truck driver for about 41 years. On May 17, 2009, he obtained employment with respondent as an over-the-road trucker. The tractor which claimant was provided had not been used for a couple of months and had to be jump-started when claimant was first provided the truck. Claimant also noted that there were several spiders in the truck. He advised the lead driver, Bill Marsh, and was told to get some spray for the cab. Claimant bought the spray and sprayed the inside of the cab. On a date uncertain, claimant saw one surviving spider in the cab, but does not remember exactly when this occurred. Claimant was able to positively identify the spider he saw in the cab of the truck as a brown recluse spider.

On Wednesday, June 24, 2009, claimant was traveling to Pennsylvania in that truck. He slept in the cab of the truck that night. The next morning, he awoke with a sore toe. He described the toe as having a red spot and a little black dot on the end of the toe. Claimant continued to travel for respondent, and the toe progressively worsened to the point that within two days, claimant was driving with a house slipper on his right foot. By the Sunday after the accident, claimant's second toe on his right foot was black, was beginning to smell and was draining. The toe was very painful. Claimant advised respondent of the worsening condition and was asked to drive to Nashville, Tennessee. There, claimant was met by two of his brothers, one of which is a licensed EMT. That brother advised claimant that he had been bitten by something. Claimant asked that they drive him back to Kansas, which they did. Claimant acknowledged that he did not see a spider on the 24th or 25th when he thought he had been bitten. He did have a spider crawl on his face as he slept in the sleeper cab. This was after he had sprayed the cab of the truck.

Claimant was taken to Newman Regional Health center in Emporia, Kansas, and was attended in the emergency room by Robert F. Dorsey, M.D. Claimant was immediately admitted to the emergency room and into the hospital the next day. Claimant's toe, foot and leg had swollen to the point that they almost could not get his pants off in the emergency room. Claimant's toe was then amputated. Claimant remained in the hospital for several days.

The admission records at Newman Regional Health do not mention a spider bite. Claimant did testify that he mentioned the bite to Dr. Dorsey. But, the doctor said the toe was so badly deteriorated that he was unable to make a diagnosis as to the cause of the injury. The intake medical report does mention claimant having a history of erythema for about one month before his admission to the hospital. Claimant acknowledged that Dr. Dorsey had treated his second toe on his right foot for a blister in February or March 2009. The blister was caused by a pair of cowboy boots. Claimant denies saying that he had swelling for about a month prior to the admission date. The medical report also discusses diabetes with peripheral circulatory manifestations and neurological manifestations. But claimant has no idea what is meant by those diagnoses. He denies ever having problems with his extremities due to diabetes. It is also noted that the discharge summary fails to discuss a spider bite. Claimant described the bite as being near the tip of the toe, and not on the bottom.<sup>1</sup>

At the second preliminary hearing held on February 5, 2010, claimant described his ongoing pain in his right foot because his great toe is drifting sideways into the vacant area caused by the amputation of the second toe. On cross-examination claimant was read testimony from the first preliminary hearing where he was questioned about diabetes and was further questioned regarding medical records that indicated his diabetic condition required more medication than he had indicated at the first preliminary hearing. And claimant was questioned about the treatment he received for the blister on his toe before the spider bite. Although not mentioned at the first preliminary hearing, claimant agreed that the treatment required IV antibiotics. Upon questioning from the ALJ, claimant testified the progression of the spider bite was completely different than the blood blister.

In summary, respondent argues the claimant's credibility is impeached given the differences in testimony regarding his diabetic condition and the treatment received for the toe blister. And because claimant's credibility is paramount to the determination of whether he suffered a compensable injury, he should not be believed regarding the spider bite. This Board Member disagrees. Although it appears that claimant's treatment for a diabetic condition may have required more medication than he initially stated that does not change the underlying facts nor so damage claimant's credibility that he can no longer be believed. The same can be said for the treatment received for his toe blister. This Board Member finds claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

Respondent also raised the issue of claimant's entitlement to temporary total disability compensation. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only

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<sup>1</sup> Kan. WCAB Nov. 20, 2009.

allegations that an administrative law judge exceeded his or her jurisdiction.<sup>2</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>3</sup>

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>4</sup>

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, the ALJ did not exceed his jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. Once the issue of causation is determined, the issues dealing with TTD benefits and ongoing medical treatment are rendered moot. Respondent’s appeal of these issues is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated February 5, 2010, is affirmed.

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<sup>2</sup> K.S.A. 2008 Supp. 44-551.

<sup>3</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>4</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2009 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this 30th day of April 2010.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant  
Abigail L. Pierpoint, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge